Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1874

GENE STIPE, ET AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES P. LINN
and
BERNARD J. ROTHBAUM, JR.
of
LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
Attorney for Petitioner, Gene Stipe

W. H. LAYDEN
323 E. Carl Albert Parkway
McAlester, Oklahoma 74501
Attorney for Petitioner, John Warren Martin
and
WARREN GOTCHER
325 E. Carl Albert Parkway
McAlester, Oklahoma 74501
Attorney for Petitioner, John Glenn Peters

May, 1980

UTTERBACK TYPESETTING CO. — PHONE 235-0030 — 3740 S. HOLLIDAY AVE. — OKLA. CITY, OKLA. 73115

ERRATA

On the introductory page of this Petition, there is a printer's transposition. The second sentence of the Petition should read: "These are questions to which this Court has not spoken since Abney v. United States, 431 U.S. 651, was decided in 1977, and upon at least one of which the Courts of Appeals for four Circuits are in conflict."

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF CRIMINAL AND APPELLATE PROCEDURE INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
CERTIFICATE OF SERVICE follows Petition	
APPENDICES:	
A — Opinion of the Court of Appeals	A-1
B — Order of the District Court for the Western District of Oklahoma	B-1
C — Indictment	C-1

TABLE OF AUTHORITIES

Cases	PAGE
Abney v. United States, 431 U.S. 651 (1977)	1, 2, 8, 10, 11, 15
Browder v. Director, Department of Corrections, 434 U.S. 257, 98 S.Ct. 556 (1978)	9, 14
Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949)	10, 13
Curtiss-Wright Corporation v. General Electric Company, ____ U.S. ____, ____ S.Ct. ____, 48 U.S.L.W. 4422 (4/22/80)	13
Harris v. Washington, 404 U.S. 55 (1971)	8
Helstoski v. Meanor, 442 U.S. 500 (1979)	9, 11
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963)	2, 5, 8
Owen v. United States, 386 F.2d 774 (5th Cir. 1967)	6
Ross v. United States, 205 F.2d 619 (10th Cir. 1953)	6
Serfass v. United States, 420 U.S. 377 (1975)	10-11
United States v. Alessi, 536 F.2d 978 (2d Cir. 1976)	9
United States v. Cores, 356 U.S. 405 (1958)	15
United States v. Gamble, 607 F.2d 820 (9th Cir. 1979)	13
United States v. Gaertner, 583 F.2d 308 (7th Cir. 1978) cert. denied, 440 U.S. 918 (1979)	5, 12
United States v. Griffin, ____ F.2d ____, 48 U.S.L.W. 2634 (9th Cir. 1980)	5, 9, 10
United States v. Inmon, 568 F.2d 326 (3rd Cir. 1977)	12
United States v. Johnson, 323 U.S. 273 (1944)	7, 15
United States v. Robinson, 361 U.S. 220 (1960)	2, 5, 11, 12, 13, 14
United States v. Sisson, 399 U.S. 267 (1971)	10-11
United States v. Sorrens, 605 F.2d 1211 (1st Cir. 1979)	10

AUTHORITIES CONTINUED PAGE

United States Constitution

Aritcle I, §6 15
Article III, §2, cl.3 ..... 2, 3, 8, 15
Amendment VI 2, 3, 8, 15

Statutes

15 U.S.C. §645(a) 4
28 U.S.C. §1254(1) 2
28 U.S.C. §1291 ..... 1, 2, 3, 4, 9, 10, 11
28 U.S.C. §1292(b) 13

Federal Rules of Appellate Procedure

Rule 4(b) 1, 2, 3, 5, 11, 12

Federal Rules of Civil Procedure

Rule 54(b) 13

Federal Rules of Criminal Procedure

Rule 12(b) 3
Rule 12(f) 3
Rule 18 4

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No. .....

GENE STIPE, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTION

The instant petition for certiorari presents important questions as to the "finality" requirement for immediate appealability under 28 U.S.C. §1291, the ten-day time-bar of Rule 4(b) of the Federal Rules of Appellate Procedure and their proper application in a criminal case. These are questions to which this Court has not spoken since *Abney* v. *United States,* 431 U.S. 651, was decided in 1977, and upon which at least one of the Courts of Appeals for four Circuits are in conflict. Certiorari is sought to resolve that conflict, and to correct two jurisdictional holdings by the Court of Appeals for the Tenth Circuit below, which, we believe, are in patent conflict with decisions of this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit ____ F.2d ____, not yet reported, but designated by the Court of Appeals for publication as precedent for the Tenth Circuit, and the mandate of the Court of Appeals, appear as Appendix A hereto. The unreported order of the District Court for the Western District of Oklahoma appears as Appendix B hereto.

JURISDICTION

The judgment and mandate of the Court of Appeals were entered on April 28, 1980. This petition for certiorari was filed within thirty days from that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1), *Abney* v. *United States,* 431 U.S. 651, 653 (1977).

QUESTIONS PRESENTED

1. Whether an order of a United States District Court overruling a motion to dismiss a felony indictment on the ground that there is want of venue, *apparent as a matter of law on the face of the indictment,* and, thus, that any trial would, itself, violate Article III, §2, cl.3 and Amendment VI of the Constitution, is a "collateral order" which is a "final decision" and, therefore, immediately appealable under 28 U.S.C. §1291, under the authority of *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 557-558?

2. If such a decision is a "final decision", must the appeal be noticed within ten days under the time-bar of Rule 4(b), F.R.App.P., and this Court's holding in *United States* v. *Robinson,* 361 U.S. 220, 224?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF CRIMINAL AND APPELLATE PROCEDURE INVOLVED

Article III, §2, cl.3 of the Constitution provides:

> "The Trial of all Crimes . . . shall be held in the State wherein the said Crimes shall have been committed. . . ."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime was committed . . ."

28 U.S.C. §1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

Federal Rule of Criminal Procedure 12(b) and 12(f) provide, in pertinent part:

> "Any defense . . . which is capable of determination without the trial of the general issue may be raised before trial on motion. The following *must* be raised prior to trial . . . (2) defenses and objections based upon defects in the indictment. . . . Failure by a party to raise defenses or objections . . . which must be made prior to trial . . . shall constitute waiver thereof. . . ." (emphasis added).

Federal Rule of Appellate Procedure 4(b) provides, in pertinent part:

> "In a criminal case, the notice of appeal shall be filed in the district court within 10 days after the *entry* of the judgment or order *appealed from*. . . ." (emphasis added).

STATEMENT OF THE CASE

On July 9, 1979, petitioners, all of whom are residents of the Eastern Judicial District of Oklahoma, were indicted by a grand jury sitting in the Western District of Oklahoma for allegedly violating 15 U.S.C. §645(a) (making false statements to the Small Business Administration), conspiracy to commit that offense, and aiding and abetting that offense. Petitioners filed motions to dismiss the indictment for want of venue apparent on the face thereof, in accordance with Rule 18, F.R.Crim.P.

The District Court overruled the motions to dismiss.

Petitioners timely noticed appeals from that decision to the Court of Appeals for the Tenth Circuit.

The Court of Appeals dismissed the appeals, holding the District Court's order was not a "collateral order" and, therefore, was not a "final decision" under 28 U.S.C. §1291.[1] The Court of Appeals has directed its opinion to be published as controlling precedent in the Tenth Circuit.

The sole reason given by the Court of Appeals for dismissing the appeals was

> "The circumstances and issues of this case do not demonstrate sufficient finality, separability, and irreparable injury [*sic*] to justify immediate appealability of the pretrial venue ruling." App. A, p. A-3.

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[1] One of the petitioners, Mr. Stipe, also filed a petition for a writ of mandamus compelling the district court to dismiss the indictment for want of venue. The Court of Appeals declined to issue the writ. Since mandamus is a discretionary writ, no review of that decision is sought.

The Court of Appeals assumed, without discussion, that

> ". . . [t]he defendants' claims may be fully and adequately reviewed, and the defendants' rights protected, on direct appeal in the event of conviction in the District Court." App. A, p. A-4.

The Court of Appeals also assumed that Rule 4(b), F.R. App.P. was no obstacle to this holding, believing that,

> "*Even if* the pretrial venue ruling in this case *were* found to be immediately appealable under *Cohen* [v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541, 545-546 (1949) failure to bring an interlocutory [*sic*] appeal would not preclude review of the order by an appeal from a final disposition in the trial court." App. A, p. A-4, n.1 (emphasis added).

The Court of Appeals cited only *United States* v. *Gaertner,* 583 F.2d 308 (7th Cir. 1978) *cert. denied,* 440 U.S. 918 (1979), for its holding that both the defendant and the Court of Appeals had an "option" as to *when* to appeal, Rule 4(b), F.R.App.P. notwithstanding. *Gaertner* itself cited *no* authority for the *unprecedented* idea it announced.

Because of the importance of the questions presented, the irreconcilable conflict between the decision below and the decision of this Court in *Mercantile National Bank* v. *Langdeau,* 337 U.S. 555, 557-558 (1963), and its progeny, and *United States* v. *Robinson,* 361 U.S. 220, 224, 229-230 (1960), as well as the conflict between the decision below and the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Griffin,* No. 79-1513, ____ F.2d ____, 48 U.S.L.W. 2634-2635 (9th Cir. 1980), the instant petition for certiorari has been brought to this Court.

Since the opinion of the Court of Appeals below contains no mention of the facts, a very brief statement will serve to put the importance of the constitutional issue presented in perspective. All petitioners reside within the Eastern Judicial District of Oklahoma. The small business entity which applied for the loan, *and* the bank which made the loan that the Small Business Administration guaranteed, are both located in the Eastern Judicial District of Oklahoma. The alleged "false statements" concern an "appraiser's opinion" and a "secret agreement" as to ownership of the business by residents of the Eastern District of Oklahoma. Petitioner Martin is the former President of the lending bank. Petitioner Stipe is an attorney who has long been a member of the Oklahoma State Senate, representing a large community within the Eastern District of Oklahoma.

The alleged offense is complete as soon as allegedly false statements are made available to any authorized *agent* of the Small Business Administration, to-wit, in this case, the lending bank. *Owen* v. *United States,* 386 F.2d 774, 775, 777 (5th Cir. 1967). The District Court has recognized, and attempted to apply, this rule in this case. App. B, p. B-3. The use of the mails is not an element of the alleged offense. The District Court has so held in this case. *Id.*

If the mails were used *only* as the means to transmit an allegedly false document from an authorized SBA agent to an SBA office, venue lies only in the district where the mailing was initiated, to-wit, the Eastern District of Oklahoma, *Ross* v. *United States,* 205 F.2d 619, 621 (10th Cir. 1953).

In short, the indictment itself, which appears as Appendix C hereto, shows that this is a case involving an alleged offense by persons who are all life-long residents of the Eastern District of Oklahoma, with regard to a business, and a bank, which are both located within the Eastern District of Oklahoma and the petitioners, thus, seek a trial in the District of their homes as well as the District wherein the alleged acts were done, if done at all.

The Government's key witnesses, including the two named unindicted co-conspirators, reside within the Eastern District of Oklahoma. App. C, p. C-2.

There is no reason to attempt to improperly force venue into the Western District of Oklahoma other than the Government's desire to deprive these petitioners of a trial before a jury of the vicanage.[2]

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[2] Of course, we are fully aware that venue lies in the District where an act was allegedly done, rather than the Disrtict of the defendants' residence. However, where, as here, the District is the same, powerful considerations of constitutional *policy* come into play. *United States* v. *Johnson,* 323 U.S. 273, 276 (1944).

REASONS FOR GRANTING THE WRIT

1. The decision below holds that want of venue, *even if apparent as a matter of law on the face of a felony indictment,* is not a "collateral order" separable from, and independent of, the merits of the Government's case. The holding below is in irreconcilable conflict with this Court's holding in *Mercantile National Bank* v. *Langdeau, supra,* 371 U.S. at 557, that want of venue as a matter of law *is*

> ". . . *a separate and independent matter,* anterior to the merits and not enmeshed in the factual and legal issues constituting the plaintiff's cause of action." (emphasis added).

Therefore, as this Court held in *Mercantile,* such an order is immediately appealable.

Since *Mercantile* has been subsequently held to be controlling precedent in its context of a state pretrial *criminal* appeal, *Harris* v. *Washington,* 404 U.S. 55, 56 (1971), and since *Harris* has, in turn, been held to be squarely controlling in the context of a federal pretrial criminal appeal, *Abney* v. *United States,* 431 U.S. 651, 658 (1977), it is apparent that the opinion below cannot be reconciled to this Court's opinion in *Mercantile* and its progeny. Indeed, if a merely *statutory* venue limitation, such as that in *Mercantile,* is sufficiently collateral to the merits, and presents a sufficiently independent question of law, so as to constitute an immediately appealable "final decision", as *Mercantile* held, it follows *a fortiori* that a limitation on venue in a *criminal* case, which arises by force of the *Constitution* itself (Article III, §2, cl.3 and Amend. VI) must be equally "collateral" and, therefore, must be a "final decision" which

can be immediately appealed in order to vindicate the Constitutional right claimed by the petitioners, where, as in this case, the want of venue is apparent as a matter of law on the face of the indictment. *Cf., Helstoski* v. *Meanor,* 442 U.S. 506-508 (1979).

Under *Mercantile,* as applied in *Harris* and *Abney,* the decision below, holding that *no* claim of want of venue, even if the showing of the want of venue is apparent on the face of the indictment as a matter of law, is immediately appealable, is in error, and must be reversed.[3]

2. The decision below is in irreconcilable conflict with the interpretation of 28 U.S.C. §1291 announced by the Second Circuit in *United States* v. *Alessi,* 536 F.2d 978-981 (2d Cir. 1976), *cert. denied* 429 U.S. 960 (1976), and by the Ninth Circuit in *United States* v. *Griffin, supra.* In *Alessi,* the Court unanimously held that a pretrial order overruling a criminal defendant's motion to dismiss an indictment based upon alleged breach of the plea bargain was a "final decision" and was, therefore, immediately appealable. The *Alessi* Court reasoned that if the defendant was correct, the trial itself would be illegal. In *Griffin,* the Ninth Circuit unanimously held that a pretrial order overruling a

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[3] It is conceivable, under one reading of the cryptic language of the opinion below, that the Court of Appeals' opinion could be interpreted as holding that *some* claims of want of venue, apparent on the face of the indictment, *are* immediately appealable, while others *are not.* This does not appear to be the intent of the court below. If, however, the opinion is so read, it *clearly* "confuses error with non-finality and fails to distinguish between the [merits of the substantive issue presented] and the procedural means for correcting a certain error . . ." *Browder* v. *Director, Department of Corrections,* 434 U.S. 257, 98 S.Ct. 556, 561-562. Thus, if so interpreted, the decision below conflicts with controlling precedents of this Court and must be reversed.

criminal defendant's motion to dismiss an indictment based upon an alleged violation of the Due Process Clause of the Fifth Amendment through alleged "vindictive prosecution" was a "final decision" which was immediately appealable for the same reason, saying that this "conclusion necessarily follows once the criteria identified in *Abney* and *Cohen* are applied to the instant motion." *Griffin, supra,* Slip Op. p. 228. Both *Alessi* and *Griffin* rely on this Court's holding in *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541 (1949). Additionally, *Griffin* relies on the rationale announced by this Court in *Abney* v. *United States, supra.* There is simply no distinction between *Alessi* and *Griffin* on the one hand, and the decision below on the other. This conflict as to the proper interpretation of the "finality" requirement of 28 U.S.C. §1291 in the context of an immediate appeal from a pretrial order overruling a motion to dismiss an indictment presents an unusually clear and sharp conflict among the Circuits. In view of the importance of the question presented, the conflict should be resolved by this Court.

Especially is this true since the court below has entered a jurisdictional dismissal. If *Alessi* and *Griffin* were rightly decided, the decision below was wrongly decided. And *United States* v. *Sorrens,* 605 F.2d 1211 (1st Cir. 1979), the decision relied upon by the court below, was, necessarily, wrongly decided if *Alessi* and *Griffin* were rightly decided.

This contrariety on so important an issue of federal appellate jurisdiction reminds again that:

> "Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise, the courts and the parties must expend great energy, not on the merits of dispute settlement, but on

> simply deciding whether the court has the power to hear a case." *Serfass* v. *United States*, 420 U.S. 377, 384 (1975), *quoting, United States* v. *Sisson*, 399 U.S. 267, 307 (1971).

It is significant that *Serfass* and *Sisson*, both criminal cases, were the occasion for this re-emphasis on certainty as to matters of appellate jurisdiction. This Court has consistently held that the right of a defendant in a criminal case to *any* appeal is "purely a creature of statute", *Abney* v. *United States, supra*, 431 U.S. at 656. Therefore, compliance with the controlling statute, 28 U.S.C. §1291, and the "mandatory and jurisdictional" provision of Rule 4(b), F.R. App.P. are of enormous importance. *Helstoski* v. *Meanor*, 442 U.S. 500, 507-508 and n.4 (1979); *United States* v. *Robinson*, 361 U.S. 220, 224 (1960).

Failure to strictly comply with the statute or the Rule is fatal to consideration of the merits of a criminal appeal, regardless of the importance of the question the appeal may present. *Helstoski, supra; Robinson, supra.*

In light of the settled rule that §1291 does not

> ". . . uniformly limit jurisdiction to 'those final judgments which terminate an action' ", *Abney, supra*, 431 U.S. at 658 *quoting, Cohen, supra*, 337 U.S. at 545,

the serious conflict among the First, Second, Ninth and Tenth Circuits on the question of when a pretrial order in a criminal case is immediately appealable is a conflict going to the heart of the proper functioning of federal criminal justice. Particularly in the context of federal criminal appeals, such antipathy imposes unwarranted, deeply vexing uncertainty on both the District Courts and the

bar. No conscientious attorney relishes being told he has waived his client's statutory right to one review of important decisions of a District Court, and no conscientious District Judge desires to impose such a result.[4]

3. The decision below seriously misinterprets the "procedural consequences of the rule of Abney", *United States* v. *Inmon,* 568 F.2d 326, 329 (3rd Cir. 1977), particularly the "consequence" of proper compliance with the ten-day time-bar of Rule 4(b), F.R.App.P. The decision below proceeds on the unique theory that the defendant in a criminal case has an "option" as to whether to timely comply with Rule 4(b) in seeking review of the *order of which he complains,* and that the Courts of Appeals have an "option" as to whether to accept or reject appellate jurisdiction *even if* the District Court's decision clearly *is* a "final decision" within the meaning of 28 U.S.C. §1291. App. A, p. A-4, n.1.

It is true, as the court below noted, that the Seventh Circuit stated such an "option" existed in *United States* v. *Gaertner, supra. Gaertner,* however, cited no authority for this novel notion. The reason is that no authority exists. This concept is based upon the misconception that, in the words of the court below, such an appeal is an "interlocutory appeal." *Id.* It is not. *If* the District Court's order *is* a "final decision", there is no "interlocutory", permissive appeal present in the case. The District Court's decision, if "final", *must* be appealed in the time limit established by Rule 4(b), F.R.App.P., or never receive any appellate review at all. *United States* v. *Robinson, supra,* 361 U.S. 220, 224.

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[4] That is the reason the District Judge in this case stayed trial pending appellate review of his order overruling the motions to dismiss herein.

Further, and of equally great importance, *if* the District Court's order *is* a "collateral order" within the meaning of *Cohen*, it follows, by definition, that it does not "merge" into any "final judgment", and, therefore, *"could not* be reviewed" on appeal from "a final judgment." *Cohen, supra*, 337 U.S. 545, 546 (emphasis added). The contrary holding below plainly conflicts with *Cohen's* holding on this point and, therefore, must be reversed.

It should also be noted that the *Government* has *never* suggested such a theory in any Court of Appeals, and most certainly did not do so here. In light of the fervor of the Government's brief in this Court in *Robinson, supra*, this is understandable. The "option" theory of appealability is an unprecedented "innovation" in federal appellate practice. It has no support in any decision of this Court. The holding below that such an "option" exists, is clearly an issue issue of sufficient magnitude to warrant plenary consideration of this Court.[5]

The suggestion that a defendant in a criminal case has an "option" as to whether to file a notice of appeal within ten days from the date of an order of a District Court which *is* a "final decision" within the meaning of §1291, may, or may not, be sound policy. *Cf*, 28 U.S.C. §1292(b) and *Curtiss-Wright Corporation* v. *General Electric Company*, ... U.S. ....., ... S.Ct. ....., 48 U.S.L.W. 4422 (4/22/80) (Rule 54(b), F.R.Civ.P.).

Discussion of the point is fruitless, however, since it is a "policy consideration" which this Court has emphat-

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[5] *United States* v. *Gamble*, 607 F.2d 820, 823 (9th Cir. 1979), appears to adopt the *Gaertner* theory, but it does so solely on the authority of *Gaertner* itself.

ically held the Courts of Appeals do *not* have the power to resolve. *United States* v. *Robinson, supra.* In *Robinson,* this Court, on the Government's petition for certiorari to the Court of Appeals for the District of Columbia Circuit, held that even a compelling showing of excusable neglect, which had resulted in the filing of a notice of appeal on behalf of an indigent criminal defendant one day late, could not give the Court of Appeals jurisdiction. In the course of reversing the Court of Appeals, this Court emphasized that, regardless of whether the Court of Appeals had reached a just result, the policy consideration upon which the Court of Appeals had done so was an impermissible consideration:

> "That powerful policy arguments may be made both for and against flexibility with respect to the time for taking an appeal is indeed evident. [But,] . . . whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it." *Robinson, supra,* 361 U.S. at 229-230.

This Court recently reiterated *Robinson's* holding in *Browder* v. *Director, Department of Corrections, supra,* 434 U.S. 257, 98 S.Ct. 556, 561-565 (1978), and it must follow that the "option" theory as in the ten-day time-bar of Rule 4(b), whether desirable or not, is a concept which was "beyond the power of the Court of Appeals" to create.

4. There is absolutely no principle of public policy or statutory construction which should lead this Court to construe §1291 so as to forbid an immediate appeal on the merits of a pretrial order refusing to dismiss a felony indictment because there is want of venue apparent as a matter of law on the face of the indictment.

On the contrary, this Court has repeatedly emphasized that questions of venue are "not mere matters of procedure", and that they "raise deep issues of public policy in light of which legislation must be construed." *United States* v. *Cores*, 356 U.S. 405, 407 (1958), *quoting, United States* v. *Johnson*, 323 U.S. 273, 276 (1944). As Mr. Justice Frankfurter emphasized in *Johnson*, this "deep issue of public policy" is particularly compelling when, as in the instant case, the defendants are seeking trial in the District wherein proper venue lies and the District which is the District of their homes.

Surely, the Constitutional right of a defendant in a federal felony case not to suffer an illegal trial in a judicial district where venue is improper and where the impropriety can be ascertained on the face of the indictment itself, measured against the controlling law, a right guaranteed by the Constitution not once, but twice (Article III, §2, cl.3 and Amendment VI) is no less worthy of full and immediate protection by the appellate bench than the right not to be placed twice in jeopardy (*Abney*) or the privilege of Congressmen found in the immunity created by the Speech or Debate Clause of Article I, §6 (*Helstoski*). It follows, in the words of the *Abney* Court, that the venue "challenge to the indictment must be reviewable before [the trial] occurs." *Abney, supra*, 431 U.S. at 662.

As in *Abney*, acceptance of the Government's argument would lead to the absurd result that a defendant may *avoid* being subjected to trial in a District wherein venue is improper only by *suffering* the very trial the Constitution forbids.

It is to avoid precisely such absurdities that *Abney* was decided.

The decision below is erroneous, is in conflict with decisions of this Court, and of other Circuits, and should be reviewed and reversed.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES P. LINN
and
BERNARD J. ROTHBAUM, JR.
of
LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6781

Attorney for Petitioner, Gene Stipe

W. H. LAYDEN
323 E. Carl Albert Parkway
McAlester, Oklahoma 74501
(918) 423-6202

Attorney for Petitioner,
John Warren Martin

and

WARREN GOTCHER
325 E. Carl Albert Parkway
McAlester, Oklahoma 74501
(918) 423-3603

Attorney for Petitioner,
John Glenn Peters

May, 1980

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the instrument to which this certification is attached, were mailed to the following named counsel this ..... day of May, 1980, postage fully prepaid:

The Honorable Wade H. McCree
Solicitor General
Office of the Solicitor General
Washington, D.C. 20530

Larry D. Patton, Esq.
United States Attorney for the
Western District of Oklahoma
4434 Federal Building
Oklahoma City, Oklahoma 73102

And to further certify that all parties required to be served have been served.

.....
Bernard J. Rothbaum, Jr.

APPENDICES

APPENDIX A

PUBLISH

[Filed April 28, 1980]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	Nos. 79-1985
	)	79-1986
JOHN WARREN MARTIN, JOHN GLENN PETERS and GENE STIPE, Defendants-Appellants.	)	79-1987

Consolidated with:

GENE STIPE, Petitioner,	)	
v.	)	
	)	No. 79-1956
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, HONORABLE RALPH G. THOMPSON, UNITED STATES DISTRICT JUDGE, Respondents.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. Case No. CR-79-123-T)

and

PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION

B. J. Rothbaum, Jr. (James P. Linn with him on the brief), of Linn, Helms, Kirk & Burkett, Oklahoma City, Oklahoma, for Defendant-Appellant and Petitioner Gene Stipe.

Larry D. Patton, United States Attorney for the Western District of Oklahoma (Teresa M. Black, Assistant U. S. Attorney; John R. Osgood, Special Assistant U. S. Attorney, with him on the brief), for Plaintiff-Appellee.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

McKAY, Circuit Judge.

Defendants Martin, Peters and Stipe were indicted by a federal grand jury in the Western District of Oklahoma. The multi-page, five-count indictment charges substantive violations of 15 U.S.C. § 645(a), making false statements to the Small Business Administration, as well as conspiracy and aiding and abetting. The defendants moved to dismiss, urging that as a matter of law venue could not lie in the Western District of Oklahoma and that the indictment was fatally ambiguous in failing properly to allege venue. Essentially, the dispute centers on whether venue properly lies in the district from which the alleged false statements originated or in the district where they were received by the SBA. Defendants filed a direct appeal seeking review of the district court's order denying their motions to dismiss, and defendant Stipe has also petitioned for a writ of mandamus compelling the district court to dismiss the indictment. We ordered consolidation of the mandamus petition and appeal.

APPEAL

Appellate jurisdiction is urged under 28 U.S.C. § 1291. Generally, district court dispositions of pretrial motions do not qualify for immediate appellate review. By its terms, § 1291 permits appeals only from final decisions of the dis-

trict courts. In order for the court's pretrial order to be immediately appealable under § 1291, it must fall within the narrow confines of the collateral order doctrine announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949).

The circumstances and issues of this case do not demonstrate sufficient finality, separability and irreparable injury to justify immediate appealability of the pretrial venue ruling. *Cf. Helstoski* v. *Meanor*, 442 U.S. 500, 506-08 (1979); *United States* v. *MacDonald*, 435 U.S. 850 (1978); *Abney* v. *United States*, 431 U.S. 651 (1977); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963) (construing 28 U.S.C. § 1257(2); *United States* v. *Sorren*, 605 F.2d 1211, 1213-15 (1st Cir. 1979).

MANDAMUS

Traditionally, mandamus is used to confine a court to a lawful exercise of its jurisdiction or to compel a court to exercise its authority when it is its duty to do so. *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953). Mandamus is a drastic remedy which is available only in extraordinary situations. *Kerr* v. *United States District Court*, 426 U.S. at 402. It is appropriate only when the petitioner's right to relief is clear and indisputable. *Will* v. *United States*, 389 U.S. 90, 96 (1967); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. at 384. A petition for a writ of mandamus may not be used as a substitute for appeal, *id.* at 383, and is available only if the party seeking relief has no other remedy. *See* In re *Chicago, Rock Island & Pacific Railway*, 255 U.S. 273, 275-76 (1921); *United States* v. *Sorren*, 605 F.2d 1211, 1215 (1st Cir. 1979).

The facts of this case do not warrant the invocation of our mandamus power. The petitioner's right to relief is not so clear, indisputable and compelling as to justify the extraordinary remedy sought.

Accordingly, the petition for writ of mandamus is denied and the appeal is dismissed. The defendants' claims may be fully and adequately reviewed, and the defendants' rights protected, on direct appeal in the event of conviction in the district court.[1]

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[1] The defendants' concern that, under Rule 4(b), Fed. R. App. P., failure to obtain immediate review will preclude later appellate review is unfounded. Even if the pretrial venue ruling in this case were found to be immediately appealable under *Cohen*, failure to bring an interlocutory appeal would not preclude review of the order by an appeal from a final disposition in the trial court. *See* United States v. Gaertner, 583 F.2d 308, 310 (7th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Letterhead omitted in printing]

April 28, 1980

Herbert T. Hope, Clerk
United States District Court
Room 3210
United States Courthouse
Oklahoma City, OK 73102

Re: No. 79-1987 (District Court No. 79-00123-03)
U.S.A. v. Gene Stipe

Dear Clerk:

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, effective July 1, 1968, as amended, I am enclosing a certified copy of the judgment, and a copy of the opinion, which shall constitute the mandate of this Court. You will please file this mandate in the records of your court immediately upon receipt of it by direction of this Court. I am also enclosing a form of receipt for you to sign and return to this office.

The original record on appeal will be returned to you under separate cover.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk
(s) *Howard K. Phillips*

HKP/tas

Enclosures

cc: B. J. Rothbaum, Jr., Linn, Helms, Kirk & Burkett, Suite 410, Fidelity Plaza, Oklahoma City, OK 73102

Larry D. Patton, U.S. Attorney, 4434 Federal Courthouse, Oklahoma City, OK 73102

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed Aug. 22, 1979]

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	No. CR-79-123-T
JOHN WARREN MARTIN, JOHN GLENN PETERS and GENE STIPE, Defendants	)	

ORDER

This matter comes before the Court on the motions of the defendants to dismiss for want of proper venue. Defendants Martin and Peters have adopted the motion and brief of defendant Stipe and, further, submitted briefs in addition thereto.

The defendants urge that no act set forth in the indictment occurred within the Western District of Oklahoma, therefore leaving this Court without jurisdiction. The defendants are charged in a five count indictment with a violation of 15 U.S.C. §645(a), aiding and abetting in the violation of that provision, and conspiracy to commit the offense set forth in that provision. The Court has reviewed the authorities submitted by the parties, and the indictment, and finds the motion to be without merit. In each count, some act is alleged to have occurred within the Western District of Oklahoma. It is noted that, in count I of the indictment, it is set forth that the office of the Small Business Administration (hereinafter SBA), the entity to which the false statement is alleged to have been made, is located in Oklahoma City, Oklahoma, within the Western Judicial District of Oklahoma.

In each count it is alleged that the defendants, or one of them, or an unindicted co-conspirator, delivered, submitted, caused to be submitted, transmitted, or caused to be transmitted, a false statement, knowing said statements to be false when made, for the purpose of influencing the actions of the SBA concerning a certain application for an SBA loan guarantee.

The first count of the indictment charges a violation of 18 U.S.C. §371, conspiracy to commit an offense against the United States in violation of 15 U.S.C. §645(a). It is clearly the law that an overt act committed in the course of a conspiracy and in furtherance of the conspiracy which occurs in a district gives rise to jurisdiction to prosecute the conspirators in that district. *United States* v. *Barnard*, 490 F.2d 907 (9th Cir. 1973), and cases cited therein, cert. denied 416 U.S. 595. The overt acts set forth in the indictment include several acts which are alleged to have occurred in the Western District of Oklahoma. These acts allege that certain documentation was delivered to or caused to be delivered to the SBA. The overt acts alleged to have been committed in furtherance of the conspiracy are the delivery of documents to the SBA in Oklahoma City, Oklahoma, and these overt acts, being committed within the Western Judicial District of Oklahoma, are sufficient to give rise to the jurisdiction of this Court in the prosecution of count I.

Counts II through IV alleged substantive violations of 15 U.S.C. §645(a), or aiding and abetting in the same by some or all of the defendants herein. In each instance, it is alleged that a false statement was made to the SBA, located in Oklahoma City, Oklahoma, in the Western District of Oklahoma, by one or more persons, and that the defendants herein did either submit the false statement or aid and abet in its submission. The offense of aiding and abetting another in the commission of a crime, 18 U.S.C. §2, is triable in either the district where such aiding and abetting occurred or in the district where the substantive offense occurred. *United States* v. *Coppola*, 486 F.2d 882 (10th Cir.

1973), cert. denied 415 U.S. 948 (1973); *United States* v. *Buckhanon,* 505 F.2d 1079 (8th Cir. 1974); *Downing* v. *United States,* 348 F.2d 594 (5th Cir. 1965); *United States* v. *Chesnut,* 399 F.Supp. 1292 (S.D. N.Y. 1975), aff'd 533 F.2d 40 (2nd Cir. 1976), cert. denied 415 U.S. 948 (1976).

The substantive offense set forth in the indictment is the submission of a false statement to the SBA, knowing the same to be false, in order to induce action on the part of the SBA. That offense occurred within the Western Judicial District of Oklahoma. Therefore, the substantive offense may be tried within the Western District of Oklahoma, as can the offense of aiding and abetting in said violation.

The defendants devote substantial attention to the question of whether the offense was completed upon the mailing of the false statement, the mailing purportedly having occurred in the Western District of Oklahoma. It is noted that the indictment does not allege that the false statement was mailed to the SBA office from a point within the Eastern District of Oklahoma, but instead alleges that it was submitted to the SBA office in Oklahoma City, Oklahoma. However, the cases cited by the defendants are distinguishable in that the offense with which they were charged were completed upon the submission of certain items to the postal service for mailing. The use of the mail service was the basis of the offense and the offense was committed upon the item being mailed. In the case at bar, the use of the mail is not an element of the offense. The offense is completed upon the submission to the SBA of the false statement. In the case of *United States* v. *Mischlich,* 310 F.Supp. 669 (D. N.J. 1970), the Court dealt with a situation directly applicable to the case at bar. In that case the defendant was charged with knowingly having made a false representation of a material fact in a matter within the jurisdiction of the Small Business Administration. It was held that the offense was not committed until the documents containing the alleged misrepresentation were delivered to the Small Business Administration in

Philadelphia, and the fact that action leading to the offense was at least begun in New Jersey, where the documents were prepared and from which they were carried into Pennsylvania, did not justify jurisdiction in the District of New Jersey.

In the case at bar, as in *Mischlich,* the offense alleged in the indictment requires delivery to the SBA. It is alleged that the delivery was made to the SBA office in Oklahoma City, within the Western Judicial District of Oklahoma, and, therefore, in each count venue lies in the Western District of Oklahoma. The motions of the defendants to dismiss for want of proper venue is therefore overruled.

It is so ordered this 22nd day of August, 1979.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed July 6, 1979]

UNITED STATES OF AMERICA	]
	] No. CR 79 123T
-vs-	]
	] Violations:
JOHN WARREN MARTIN	] 18 USC §371
JOHN GLENN PETERS	] 15 USC §645(a)
GENE STIPE	] 18 USC §2

INDICTMENT

The Grand Jury Charges:

COUNT ONE

That, at Oklahoma City, Oklahoma, within the Western Distirct of Oklahoma, and elsewhere:

JOHN WARREN MARTIN,
JOHN GLENN PETERS,
GENE STIPE

defendants herein, and Alex Van Zandt, Lowell Walter Cable, and others, to this Grand Jury known and unknown, did willfully and knowingly conspire and agree together and with each other, and with other persons to the Grand Jury known and unknown in violation of 18 USC §371, to commit certain offenses against the United States of America that is, to willfully and knowingly make and cause to be made false statements to the Small Business Administration ("SBA"), knowing said statements to be false when made and caused to be made, for the purpose of influencing the actions of the SBA concerning a certain application for an SBA loan guaranty, said acts in violation of 15 USC §645(a).

[APPENDIX]

The Grand Jury Further Charges That:

1. Defendant John Warren Martin ("Martin") was President of the National Bank of McAlester, a national bank located in McAlester, Oklahoma and so remained until a time after the subject application for SBA guaranty of loan had been approved, and the proceeds disbursed.

2. Defendant, John Glenn Peters ("Peters") was the owner of McAlester Frozen Foods Company, ("MFF Co.") a sole proprietorship, which was engaged in business of processing meat in a plant at McAlester, Oklahoma.

3. Defendant Gene Stipe ("Stipe") was a member of the Oklahoma State Senate and an attorney engaged in the practice of law.

4. Alex Van Zandt ("Van Zandt") was a salesman from Ada, Oklahoma, who sought to purchase MFF, Co., from Peters and operate it as MFF, Inc.

5. Lowell Walter Cable ("Cable") was a cousin of Stipe, who was employed by the State of Oklahoma as a "fuel inspector" and resided in McAlester, Oklahoma.

6. McAlester Frozen Foods, Inc. ("MFF, Inc.") was an Oklahoma corporation incorporated by Stipe on July 9, 1974. The incorporators were Van Zandt and his spouse and Peters and his spouse. The corporation was to own the assets of MFF, Co. The corporation was the applicant for an SBA guaranteed bank loan and purchased the assets of MFF Co. with part of the proceeds of said SBA guaranteed bank loan.

7. The Small Business Administration ("SBA") is an agency and instrumentality of the United States government. The office of the SBA, at which the MFF, Inc., application for bank loan guaranty was delivered, processed and approved on or about August 20, 1974, was located in Oklahoma City, Oklahoma, within the Western Judicial District of Oklahoma. MFF, Inc. defaulted upon the loan. It

and Van Zandt subsequently took bankruptcy. The collateral was sold at a foreclosure sale. The gross proceeds of the sale were $19,591.50. The SBA suffered a loss on the loan guarantee of $160.870.88.

8. An SBA bank loan guaranty is made for the purpose of guaranteeing a certain percentage of a loan made by a bank to a small business, which probably could not otherwise qualify for a loan. In this case, the SBA guaranteed 90 percent of the $175,000.00 loan which the National Bank of McAlester made to MFF, Inc. The risk of collection of the unguaranteed 10 percent remained with the National Bank of McAlester, to enable the SBA to rely upon the bank's careful review of the entire loan feasibility and subsequent servicing.

The Grand Jury charges that this conspiracy was in force and effect from on or about April, 1974, until on or about January, 1975 and was substantially as follows:

A. In April, 1974, Peters agreed to sell and Van Zandt agreed to purchase the machinery and equipment of MFF Co., for the sum of $86,000.00 both knowing that said equipment was in fact worth substantially less, in truth, approximately $20,000.00.

B. Between April and June of 1974, to accomplish the purchase of MFF Co., Van Zandt began preparation of an application for a bank loan which would be guaranteed by the SBA.

C. On or before June, 1974, Van Zandt and Stipe met and agreed that Stipe would be retained as attorney for the purpose of preparing articles of incorporation and related papers for MFF, Inc., to assist in preparation of the SBA loan guarantee application for MFF, Inc., and review said application and any accompanying or supporting documents.

D. On or before June, 1974, Van Zandt and Stipe agreed that Stipe would receive $2,500.00 attorney's fees

and a percentage of the net profits of the business for corruptly influencing and attempting to influence the actions of the SBA. It was known to Peters, Van Zandt and others that Stipe would, for sufficient payment, corruptly influence the actions of the SBA and other government agencies.

E. On or before July 3, 1974, Martin, on behalf of the National Bank of McAlester, agreed with Van Zandt and Peters to make a loan of $175,000.00 to MFF, Inc., provided that an SBA guaranty of the loan was obtained.

F. It was agreed between Martin and Stipe, that Stipe would provide a guaranty of that portion of the loan not guaranteed by the SBA. Martin prepared such a guaranty and Stipe signed it as agreed. Martin did not disclose the existence of this guaranty to the SBA. This fact, if known to the SBA, would have affected the action of the SBA upon said application.

G. On or before July 17, 1974, but not later than August 21, 1974, Van Zandt, Peters and Stipe secretly agreed to own MFF, Inc., in equal shares, 1/3 each. This agreement was known to Martin, Van Zandt, Peters and Stipe. The above-described loan application, and other documents submitted to the SBA, represented to the SBA that it was guaranteeing a loan to MFF, Inc., a corporation owned by Van Zandt and his wife. Neither before the SBA approved the loan guaranty application, nor before most of the proceeds of the loan were distributed, did Van Zandt, Peters, Martin, Stipe, MFF, Inc., or any person on their behalf, disclose this fact to the SBA. This fact, if known to the SBA, would have affected the action of the SBA upon said application. Such information was only available to the SBA after approval of the application and disbursement of most of the proceeds of the loan by the National Bank of McAlester on or about September 1, 1974.

H. On or about August 14, 1974, an affidavit of appraisal was prepared for submission to the SBA. The affi-

davit contained a false statement that the value of certain equipment and machinery was some $260,000.00. The affidavit of appraisal answered the SBA's request to Martin for a certification of the equipment's value, since prior values placed on the equipment and machinery and furnished to SBA were inconsistent. The events which transpired prior to the submission of the affidavit containing a false statement are substantially as follows:

1. The SBA, in a letter to Martin dated August 12, 1974, questioned the value of the equipment used as collateral for this loan. The SBA asked Martin about "an independent", outside appraisal, a written certification by Martin, or an audited financial statement, as to this equipment.

2. Peters and Van Zandt had prepared and caused to be prepared a list of equipment and machinery which would be collateral for the loan. Peters and Van Zandt knew that the values shown therein were false and far in excess of fair market value. This list was furnished to Stipe by Peters and Van Zandt for use in preparing an affidavit of appraisal.

3. This list represented that approximately $134,000.00 was the present value, or price paid for the equipment, and approximately $218,000.00 was the price that the equipment would cost, if it had been purchased new, or replacement cost.

4. Stipe, despite the lower values appearing on said list, prepared an affidavit of appraisal, which contained a false statement, to-wit: that the fair market value of said equipment was some $260,000.00. The list was attached to said affidavit. Martin, Peters, Stipe and Van Zandt all knew that the affidavit of appraisal would be submitted to the SBA for the purpose of influencing its action on the pending application.

5. Stipe then caused his cousin, Lowell Cable, to be contacted to come to Stipe's office, inspect the equipment to be used as collateral and sign the affidavit of appraisal, which contained the false statement that the equipment had a fair market value of some $260,000.00. Stipe, Van Zandt, and Peters agreed to submit the affidavit of appraisal and did cause this affidavit to be submitted to the SBA, knowing of the false statement of value contained therein, and that it was submitted for the purpose of influencing the action of the SBA.

6. In a letter dated August 15, 1974, Martin informed Truman Branscum of the SBA that Martin had been contacted by Stipe, who stated that he, Stipe, had been in contact with Branscum that date. Martin stated: "it was requested" that he write that he had seen the $260,000.00 appraisal and that it was "given by an individual who has had considerable experience in the operation of a slaughterhouse and packing plant" . . . "who has knowledge of this type of equipment and this type of business." Martin stated that the equipment . . . "is worth far in excess of $190,000.00" . . . "for much of this is new."

7. Martin well knew: Cable had never, to Martin's knowledge, appraised anything before; Cable was not qualified to appraise meat packing equipment; that the National Bank of McAlester had previous estimates of the values of much of the appraised equipment at only $35,000.00; that the false statements in his letter were being sent to the SBA for the purpose of influencing SBA action upon the pending application of MFF, Inc.

I. Peters agreed to pay to Stipe a sum of money for Stipe's corrupt use of his influence to affect the action of the SBA upon the aforesaid application, a fact not disclosed to the SBA by either Peters or Stipe.

J. On or before July 17, 1974, Martin agreed to loan MFF, Inc., $20,000.00 predicated upon personal guarantees of Stipe, Peters, and Van Zandt, as the three "new owners"

of that corporation. Martin caused this loan to be made to MFF, Inc. This fact was not disclosed to the SBA or to the National Bank of McAlester discount committee, by any of the aforesaid individuals.

K. Martin did not disclose to the SBA the fact that Peters had an existing mortgage on equipment upon which the SBA would rely to collateralize the aforesaid loan. Martin well knew that records of the National Bank of McAlester indicated that this equipment owned by Peters had been valued at approximately $35,000.00.

L. As more fully set forth in paragraphs A through K, herein, the defendants, and each of them did agree together to make various false statements which were to be transmitted to the SBA for the purpose of influencing the actions of said administration upon the aforesaid application. All well knew the various statements and representations to be false when made. Defendants made and participated in the making of such false statements jointly and separately as more fully set forth in paragraphs A through K and hereinafter.

To effect the objects of the above conspiracy, the defendants performed the following overt acts:

1. On or about July 3, 1974, Van Zandt delivered to the SBA an application for a loan guaranty in the amount of $175,000.00; the application was returned to Van Zandt.

2. On or about July 9, 1974, Van Zandt delivered and resubmitted to the SBA said application, which was accepted for processing by the SBA.

3. On or before July 17, 1974, Stipe, Van Zandt, and Peters agreed to own MFF, Inc., in equal shares, 1/3 each.

4. In June or July, 1974, Peters and Van Zandt caused a list of equipment, which would be collateral for the loan, to be prepared.

5. On or about August 14, 1974, Stipe caused to be prepared an affidavit of appraisal, which contained a statement, that the collateral for the loan had a fair market value of some $260,000.00.

6. On or about August 14, 1974, Cable signed the affidavit of appraisal, which contained the statement of fair market value of said collateral. This was done at Stipe's request.

7. On or about August 15, 1974, Stipe contacted the SBA in regard to the loan application of MFF, Inc.

8. On or about August 15, 1974, Stipe contacted Martin and requested Martin to send to the SBA a letter regarding the equipment values.

9. On or about August 15, 1974, Martin sent to the SBA a letter regarding the affidavit of appraisal by Cable.

10. Martin prepared a document to be executed by Stipe, which was a guaranty in favor of the National Bank of McAlester, of that portion of the MFF, Inc., loan not guaranteed by SBA. Martin caused this guarantee to be delivered to Stipe for Stipe's signature.

11. Stipe signed the document prepared by Martin and personally guaranteed that portion of the loan not guaranteed by SBA.

12. Van Zandt and Stipe caused various documents to be transmitted to the SBA for the purpose of influencing the action of the SBA upon the aforesaid loan application. Said documents are more particularly described in Count IV herein. All in violation of Title 18, United States Code, Section 371.

COUNT TWO

On or about August 14, 1974, at Oklahoma City, Oklahoma, Western Judicial District of Oklahoma, and elsewhere, and within the jurisdiction of this court,

JOHN GLENN PETERS
and
GENE STIPE

hereinafter defendants, did willfully and knowingly make and cause to be made a false statement, to-wit: a statement of fair market value of certain equipment and machinery contained in an affiadvit of appraisal, knowing said statement to be false when made, and did cause said false statement to be submitted to the Small Business Administration (SBA) in Oklahoma City, Oklahoma, for the purpose of influencing the action of the SBA upon an application for an SBA guarantee of a certain proposed bank loan, the particulars of which are set forth in Paragraph H of Count I of this indictment, which is incorporated herein. In doing so, the defendants Stipe and Peters did aid and abet, assist, counsel, induce and procure one another and others in the aforesaid acts, all in violation of Title 15, United States Code, Section 645(a) and Title 18, United States Code, Section 2.

COUNT THREE

On or about August 15, 1974, at Oklahoma City, Oklahoma, Western Judicial District of Oklahoma, and elsewhere, and within the jurisdiction of this court,

GENE STIPE
and
JOHN WARREN MARTIN

hereinafter defendants, did willfully and knowingly make and cause to be made a false statement in a letter from defendant Martin to Truman Branscum, SBA, dated August 15, 1974, knowing said statement to be false when made, and did cause said false statement to be submitted to the SBA for the purpose of influencing the action of the SBA upon an application for SBA guarantee of a proposed bank loan, the particulars of which are set forth at

Paragraph H of Count I of this indictment and incorporated by reference herein. Said statement was as follows:

"Mr. Truman Branscum
Small Business Administration
Suite 840, 50 Penn Place
Oklahoma City, Oklahoma

Re: McAlester Frozen Food, Inc.
Loan Application

Dear Mr. Branscum:

I have been contacted today by Gene Stipe, who I understand is attorney for the above-mentioned firm that has placed an application with your office, and he told me that he had been in contact with you this date. He said it was requested that I give a letter to the following effect: That the equipment that has been listed and submitted by the applicants that will be involved as collateral in this loan, on which they place a depreciated value in excess of $134,000.00, and which they say in the same would cost in excess of $218,000.00, I state that I have seen an appraisal given by an individual who has had considerable experience in the operation of a slaughterhouse and packing plant that places an estimated fair market value on the equipment in excess of $260,000.00. I have no way of determining whether or not this is an accurate figure, but I have no reason but believe that his statement could be recognized as one made by an individual who has knowledge of this type of equipment and this type of business. I further have been informed by the principals, whom I have no reason to doubt, that the depreciated value of all of the equipment would be in excess of $190,000.00, and this of course means that the existing equipment is worth far in excess of this, for much of this is new.

Trusting that this is the information you require, I remain,

Yours sincerely,

John W. Martin
President"

Said statement was false in the following regards: that an appraisal was conducted by a person of "considerable experience; that the appraiser could be recognized as one with knowledge of the equipment and the business; and that the equipment was worth "far in excess of" some $190,000.00. In doing so, the defendants Stipe and Martin did aid and abet, assist, counsel, induce and procure one another and others in the aforesaid acts, all in violation of Title 15, United States Code, Section 645(a) and Title 18, United States Code, Section 2.

COUNT FOUR

From on or about the 3rd day of July, 1974, until on or about the 9th day of July, 1974, in Oklahoma City, Oklahoma, within the Western Judicial District of Oklahoma, and elsewhere, and within the jurisdiction of this court,

JOHN WARREN MARTIN

did knowingly and willfully make and cause to be made, by himself and others, including Alex Van Zandt, a statement, knowing it to be false when made, and that said statement would be transmitted to the SBA in Oklahoma City, Oklahoma, for the purpose of influencing the action of the SBA upon a certain application for an SBA guaranty of a proposed bank loan, more particularly described in Count I of this indictment, which description is incorporated by reference herein.

Said false statement was, to-wit: a statement contained at the fourth page of the aforesaid application, executed by John Warren Martin on or about July 3, 1974, but no later than July 9, 1974, which was submitted to the SBA on or about July 9, 1974, wherein it was stated at page four, paragraph 13, subparagraph (1)(c) "Guarantors: Alex Van Zandt, Route #5, Ada, Oklahoma."

Said statement, when made, was false in the following particulars, to-wit: that John Warren Martin well knew

that the portion of the loan not guaranteed by the SBA was to be guaranteed to the National Bank of McAlester by Gene Stipe.

In doing so, the defendant John Warren Martin did aid and abet, assist, counsel, induce and procure Alex Van Zandt and others in the aforesaid acts, all in violation of Title 15, United States Code, Section 645(a) and Title 18, United States Code, Section 2.

COUNT FIVE

From on or about the 30th day of August, 1974, until on or about the 1st day of September, 1974, in Oklahoma City, Oklahoma within the Western Judicial District of Oklahoma, and elsewhere, and within the jurisdiction of this court,

JOHN GLENN PETERS
and
GENE STIPE

did knowingly and willfully make and cause to be made, by themselves, and others, including Alex Van Zandt, a statement, knowing it to be false when made, and that said statement would be transmitted to the SBA in Oklahoma City, Oklahoma, for the purpose of influencing the action of the SBA upon a certain application for an SBA guarantee of a proposed bank loan, more particularly described in Count I of this indictment, which description is incorporated by reference herein. Said false statement was, to-wit: that MFF, Inc. was owned by Van Zandt and his wife and that no persons other than Van Zandt, Van Zandt's wife, and Peters would receive compensation from the corporation for services, including services rendered upon the corporation's application for an SBA guarantee of its proposed loan.

In particular, said false statement was made in certain documents transmitted to the SBA for purposes of closing

the subject loan and disbursement of the proceeds and constituted the following, to-wit:

(a) In paragraph 1 of a certain compensation agreement, SBA Form 159, signed August 30, 1974, by defendant Stipe, representing that: ". . . the undersigned has not and will not, directly or indirectly, charge or receive any payment in connection with the application for or the making of the loan except for services actually performed on behalf of the Applicant . . ." and further representing that no compensation was paid to or was to be paid to Stipe.

(b) In a Loan Agreement, SBA Form 153, executed by Van Zandt on or about September 1, 1974, at paragraph 7, wherein it was represented in applicable portion: "Compensation — Borrower will limit the total annual compensation (including salaries, withdrawals, fees, bonuses, commissions, drawing accounts and other payments whether direct or indirect, in money, or otherwise) of all officers, stockholders, directors, partners, proprietors or other names herein to the following named persons in the amount set opposite each respective name:

Name	*Position*	*Amount*
Alex Van Zandt	President	$12,000.00
Quanita W. Van Zandt	Secretary-Treasurer	-o- "

Said statement made was false in the following particulars, to-wit: Alex Van Zandt, Gene Stipe, and John Peters had agreed that they would own MFF, Inc., in equal shares, one-third each; Van Zandt had agreed to pay Stipe a specified percentage of the net profits for use of Stipe's influence upon the SBA; Peters had agreed to pay Stipe for his influence upon the SBA, all of which was not disclosed to the SBA, despite the aforesaid representations.

In doing so, the defendants Stipe and Peters did aid and abet, assist, counsel, induce and procure one another, Alex Van Zandt, and others in the aforesaid acts, all in

violation of Title 15, United States Code, Section 645(a), and Title 18, United States Code, Section 2.

A True Bill:

FOREMAN OF THE GRAND JURY

(s) *Larry D. Patton*
LARRY D. PATTON
United States Attorney, WD Ok.

(s) *Teresa M. Black*
TERESA M. BLACK
Assistant U. S. Attorney, WD Ok.

(s) *John R. Osgood*
JOHN R. OSGOOD
Special Assistant U. S. Attorney, WD, Ok.

Supreme Court, U. S.
FILED
SEP 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1874

In the Supreme Court of the United States

OCTOBER TERM, 1980

GENE STIPE, ET AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF PETITIONERS TO DEFER CONSIDERATION AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

BERNARD J. ROTHBAUM, JR.

LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6781

Counsel of Record for Petitioners

of Counsel:

JAMES P. LINN, *Esq.*

W. H. LAYDEN, *Esq.*

WARREN GOTCHER, *Esq.*

September, 1980

TABLE OF AUTHORITIES

Cases	PAGE
Allegrucci v. *United States*, 372 U.S. 954 (1963)	2
Department of Banking v. *Pink*, 317 U.S. 264 (1942)	2
United States v. *Gargotto*, 510 F.2d 409 (6th Cir. 1974) *certiorari denied*, 421 U.S. 987 (1975), *on appeal after remand from, United States* v. *Gargotto*, 476 F.2d 1009 (6th Cir. 1973)	3
United States v. *Healey*, 376 U.S. 75 (1964)	2
Rules of the Supreme Court of the United States	
Rule 22(2) [abrogated, June 30, 1980]	2
Rule 20.1	2
Federal Rules of Appellate Procedure	
Rule 40(a)	2
Rule 41(a)	1, 2, 4
Rules of the United States Court of Appeals For the Tenth Circuit	
Rule 16	1-2, 4
Treatise	
R. Stern and E. Gressman, *Supreme Court Practice* (BNA, 5th Ed., 1978)	3

APPENDIX

PAGE

APPENDIX A:

General Docket, United States Court of Appeals for the Tenth Circuit,

United States of America v. *Gene Stipe*, No. 79-1987

United States of America v. *John Warren Martin*, No. 79-1985

United States of America v. *John Glenn Peters*, No. 79-1986

APPENDIX B:

Order of the United States District Court for the Western District of Oklahoma, filed May 7, 1980.

79-1874

In the Supreme Court of the United States

OCTOBER TERM, 1980

GENE STIPE, ET AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF PETITIONERS TO DEFER CONSIDERATION AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

COME NOW the Petitioners, Gene Stipe, John Warren Martin, and John Glenn Peters, and respectfully pray that the Court defer consideration and disposition of the pending petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, filed with the Court on May 27, 1980, until final adjudication by the Court of Appeals of a motion to recall the mandate, petition for rehearing and suggestion of rehearing *en banc* all currently *sub judice* before the Court of Appeals.

In support of this Motion, petitioners would respectfully show the Court that this Motion is the product of an unusual interplay between the provisions of Rule 41(a) of the Federal Rules of Appellate Procedure, Rule 16 of

the United States Court of Appeals for the Tenth Circuit and former Rule 22(2) [now Rule 20.1] of the Rules of this Court.

(1) Pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure and Rule 16 of the Court of Appeals for the Tenth Circuit, the Court of Appeals directed that a certified copy of its judgment, which constituted its mandate, be issued to the District Court for the Western District of Oklahoma concurrently with the filing of the opinion of the Court of Appeals on April 28, 1980. Petition for writ of certiorari, Appendix A, pp. A-1, A-5.

Under Rule 16 of the Rules of the Court of Appeals for the Tenth Circuit, this procedure eliminated the right of petitioners to file any petition for rehearing in the Court of Appeals which would be considered "timely" under Rule 40(a) of the Federal Rules of Appellate Procedure. Rule 16 of the Rules of the Court of Appeals for the Tenth Circuit provides that a petition for rehearing presented after issuance of a mandate issued concurrently with an opinion, will be treated by the Court of Appeals as a motion to recall the mandate and, if granted, will be treated as an "out of time" petition for rehearing by the panel or by the full Court.

(2) Under the settled rules of practice of this Court, only a "*timely* petition for rehearing tolls the running of the . . . period" in which to file a timely petition for certiorari in this Court. *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942) (emphasis added); *United States* v. *Healey*, 376 U.S. 75, 77-79 (1964); *see, Allegrucci v. United States*, 372 U.S. 954 (1963), where the petition for certio-

rari seeking review of an important decision of the Court of Appeals was denied "for the reason that the petition was not timely filed." *Id.* The rule is discussed at length in a standard guide on questions of practice and procedure in this Court. *See*, R. Stern and E. Gressman, *Supreme Court Practice*, §6.3 (BNA, 5th Ed., 1978). Under the circumstances of these cases, filing of a "timely" petition for rehearing in the Court of Appeals was impossible, and it was, therefore, incumbent upon counsel to file a petition seeking a writ of certiorari by May 29, 1980, regardless of possible forthcoming action by the Court of Appeals. The petition was filed with the Clerk of this Court on May 27, 1980.

(3) However, because of the importance of the issues presented, and the desirability of allowing the Court of Appeals to correct its own error, petitioners had, previously, filed, on May 7, 1980, a motion to recall the mandate, a petition for rehearing and a suggestion of rehearing *en banc* in the Court of Appeals for the Tenth Circuit. Appendix A, pp. 2-3. Petitioners did so for the reasons stated in the preceding sentence and pursuant to the holding of *United States* v. *Gargotto*, 510 F.2d 409, 412 (6th Cir. 1974) *certiorari denied*, 421 U.S. 987 (1975), *on appeal after remand from, United States* v. *Gargotto*, 476 F.2d 1009 (6th Cir. 1973). In *Gargotto*, the Court of Appeals for the Sixth Circuit squarely held that if the effect of the mandate of the Court of Appeals is to return a criminal cause to the district court for further proceedings, failure by the appellant to present a petition for rehearing constitutes a waiver of the right to urge any point of law which the appellant believes was wrongly decided on an appeal after

remand, if the point could have been presented by a petition for rehearing. *Id.*

(4) The net effect of the interplay between Rule 41(a) of the Federal Rules of Appellate Procedure, Rule 16 of the Rules of the Court of Appeals for the Tenth Circuit and the rules of practice of this Court is, thus, to create a situation in which both the Court of Appeals and this Court are potentially vested with jurisdiction by virtue of filings currently *sub judice* in both Courts.

(5) As shown by the certified copies of the docket sheets of the Court of Appeals for the Tenth Circuit in these cases, Appendix A hereto, the motion to recall the mandate, petition for rehearing, and suggestion of rehearing *en banc* were received by the Court of Appeals on May 7, 1980, and were submitted to the panel of the Court of Appeals which entered the decision presented for review here, on the same date.

As reflected by the docket sheets in these cases, Appendix A, pp. 2-3, the panel to whom these cases were submitted, and by whom they were decided, has not yet acted upon the motion to recall the mandate or petition for rehearing, nor has the Court of Appeals, or any circuit judge, taken any action upon the suggestion of rehearing *en banc*.

(6) On May 7, 1980, nine days after issuance of the mandate of the Court of Appeals, the District Court for the Western District of Oklahoma entered an order staying further proceedings looking toward a possible trial, if any, until after disposition of *both* the suggestion of rehearing *en banc* in the Court of Appeals *and* the petition for a writ

of certiorari currently *sub judice* in this Court. Appendix B, p. 1.

Petitioners respectfully submit that, under such circumstances, it would be clearly preferable to allow the Court of Appeals to consider the issues presented by petitioners' motion to recall the mandate, petition for rehearing and suggestoin of rehearing *en banc*, prior to consideration and disposition of the petition for a writ of certiorari.

In this regard, we would emphasize that the petition for rehearing and suggestion of rehearing *en banc* present to the Court of Appeals several important points of federal appellate jurisdiction which we believe the Court of Appeals overlooked or misapprehended in its opinion of April 28, 1980, and that these are the same points as are presented by the petition for certiorari currently *sub judice* in this Court.

(7) In the event the Court of Appeals grants the motion to recall the mandate and orders that these cases be reheard, either by the original panel, or by all active judges of the Court of Appeals sitting *en banc*, the pending petition for certiorari would appear to be rendered premature.

In the event such reconsideration results in a decision in favor of petitioners, the petition for certiorari would be moot, and this Court would be called upon to review the decision of the Court of Appeals, if at all, only upon consideration of a petition for a writ of certiorari which might be filed by the United States.

In the event the Court of Appeals should agree to rehear the issues here presented, and should again rule ad-

versely to petitioners, a fresh petition for a writ of certiorari to the Court of Appeals can then be presented by petitioners, seeking review of that decision.

In the event the Court of Appeals denies any rehearing or reconsideration of the issues here presented, this Court will be able to consider the pending petition for certiorari with the knowledge that it is being requested to review an important question of federal appellate procedure upon which the views of the Court of Appeals for the Tenth Circuit are firmly fixed.

Since the District Court below has itself already ordered that any possible trial in these cases will occur, if at all, only after final adjudication of the petitions *sub judice* in *both* the Court of Appeals and this Court, granting the instant motion could not in any way materially delay any such trial.

It is, therefore, respectfully submitted that until such time as the Court of Appeals has made known its ultimate disposition of the important questions here presented, consideration and disposition of the pending petition for a writ of certiorari to the Court of Appeals for the Tenth Circuit should be deferred.

Respectfully submitted,

BERNARD J. ROTHBAUM, JR.

LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6781

Counsel of Record for Petitioners

of Counsel:

JAMES P. LINN, *Esq.*
LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6781

W. H. LAYDEN, *Esq.*
323 E. Carl Albert Parkway
McAlester, Oklahoma 74501
(918) 423-6202

WARREN GOTCHER, *Esq.*
325 E. Carl Albert Parkway
McAlester, Oklahoma 74501
(918) 423-3603

September, 1980

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the instrument to which this certification is attached, were mailed, by certified mail, with postage fully prepaid thereon, to all parties required to be served, to-wit,

The Honorable Wade H. McCree, Jr.
Solicitor-General of the United States
Office of the Solicitor-General
United States Department of Justice
Washington, D.C. 20530

by the undersigned, a member of the Bar of this Court, this _____ day of September, 1980.

BERNARD J. ROTHBAUM, JR.

APPENDICES

APPENDIX A

A-1

Form A. O. 147 (July 1953)

GENERAL DOCKET 79-1987

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CR. 620 F2d 237 V.McN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CASE NO. 79-1987

JUDGE HOLLOWAY RECUSED

Cmp. Cases: 79-1985; 79-1986

TITLE OF CASE	ATTORNEYS FOR APPELLANT
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GENE STIPE, Defendant-Appellant.	(a) James P. Linn ( ) ~~Drew Neville~~ (a) B. J. Rothbaum, Jr. Linn, Helms, Kirk & Burkett Suite 410, Fidelity Plaza Oklahoma City, Oklahoma 7310: 405/ 239-6781
	ATTORNEYS FOR APPELLEE
	(a) Larry D. Patton Teresa M. Black U.S. Attorney's Office Western District of Oklahoma 4434 Federal Courthouse Oklahoma, OK 73102 405 231-5281

No. BELOW: 79-00123-03

JUDGE BELOW: Thompson

Reporter Marks

DATE OF JUDGMENT: 8-22-79

NOTICE OF APPEAL FILED: 8-31-79

Action Commenced: 7-6-79

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS
9/12/79	Docket Fee Paid in District Court			

A-2

GENERAL DOCKET

79-1

UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

CASE NO.	79-1987	United States of America v. Gene Stipe

DATE	FILINGS—PROCEEDINGS	Filed
9/12/79	CS.DKT. Case docketed	
	DKT.ST.DUE Appellant's docketing statement due 9/21/79	
9-18-79	NAPR.F. Notice of appearance filed by Linn and Rothbaum, Jr., as attor for appellant.	
9/19/79	DKT.ST.F. Appellant's docketing statement filed - 10 cc c/s	
9-25-79	M.DS.CS.F. Appellee's motion to dismiss case filed - 4cc. c/s.	
	~~M-DS-CS-RES-F- Appellant's response to motion to dismiss case filed - 4cc - c/s.~~	
	~~M-DS-CS-RES-RPLY-F. Appellee's reply to appellant's response to motion to dismiss filed - 4cc - c/s~~	
~~9-26-79~~	~~M-DS-CS-RES-RPLY-F- Appellant's reply to appellee's response to motion to dismiss filed - 6cc.~~ c/s.	
9-25-79	M.RMK.F. Appellant's motion to consolidate briefing of the motion to di filed - 4cc. c/s.	
	M.RMK.RES.F. Appellee's response to appellant's ~~to appellant's~~ motion t consolidate briefing filed - 4cc. c/s.	
	M.RMK.RES.RPLY.F. Appellant's reply to appellee's response to appellant motion to consolidate on briefing filed - 4cc. c/s.	
10-1-79	M.RMK.SUBM.PAN. Appellant's motion to consolidate briefing of the moti dismiss is submitted to panel.	
	M.RMK.RES.SUBM.PAN. Appellee's response to appellant's motion to conso briefing is submitted to panel.	
	M.RMK.RES.RPLY.SUBM.PAN. Appellant's reply to appellee's response to a motion to consolidate on briefing is submitted to panel.	
10/3/79	ROA.F Record on appeal filed, Volume I (pleadings) (108 pp); 1 copy	
10/18/79	M.DS.CS.RMK. Order: The United States shall respond to motion to dismi in its brief due 11/21/79. McWilliams, Breitenstein, Doyle	
	O.BR.DUE. Order: Appellant's brief due 11/5/79- McWilliams, Breitenst	
	O.BR.DUE. Order: Appellee's brief due 11/21/79 - McWilliams, Breitenst Doyle	
	O.HRG.SET. Order: Set for hearing to the Court on Wednesday, November 28, 1979 at 2:00 P.M. in Denver - McWilliams, Breitenstein, Doyle	
10/18/79	HRG.SET Hearing set for November, 1979, Term - Denver, Colorado	
10/23/79	NAPR.F Notice of appearance filed by Patton and Black as attorneys for Appellee	
11-5-79	M.F.BR.F. Appellants' motion to file brief in excess of pages filed - 25cc. c/s.	
	BR.F. Appellant's brief filed - 25cc. c/s.	
	APX.F. Appellant's joint appendix filed - 25cc. c/s.	
11/7/79	M.F.BR.SUBM Appellants' motion to file brief in excess of pages submitted to panel	
11/16/79	M.F.BR.DISP Granted appellant's motion to file brief in excess of pages disposed of by Barrett	
11/23/79	BR.F. Appellee's brief filed - 10 cc c/s	
	APX.F. Appellee's appendix filed - 10 cc c/s	
11/27/79	BR.F. Appellant's reply brief filed - 14 cc c/s	

A-3

Form A.O. 147a (July 1963)

NOTE IN ANY EN BANC ORDER THAT JUDGE HOLLOWAY DID NOT PARTICIPATE.

79-1987

CASE NO. 79-1'

DATE		Filed
11/28/79	CS.ARG.SUBM - case argued and submitted to Barrett, Doyle, McKay	
4/28/80	OPN.F. Published signed opinion filed - Barrett, Doyle, McKay Writing Judge is McKay	
	JM.DISP. Judgment disposed, appeal dismissed	
	MDT.ISS. Mandate issued to district court	
5/2/80	ROA.RTN.DC. Record on appeal returned to Dist. Ct. Vol. I	
5/7/80	ROA.RCPT.F. Record receipt filed	
	P.REHRG.ENB.F. Appellants' petition for rehearing en banc filed, 11 c c/s	
	P.REHRG.ENB.SUBM. Appellants' petition for rehearing en banc submitte to panel	
5/5/80	MDT.RCPT.F - mandate receipt filed	
5/31/80	P.WRIT.CERT.F. Appellant's petition for writ of certiorari filed on 5/27/80 - Supreme Court No. 79-1874.	

Form A. O. 147 (July 1953)

GENERAL DOCKET 79-1986

UNITED STATES COURT OF APPEALS

FOR THE

CR. TENTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CASE NO. 79-1986 VMcN

JUDGE HOLLOWAY RECUSED

Cmp. Cases: 79-1985; 79-1987

TITLE OF CASE	ATTORNEYS FOR APPELLANT
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHN GLENN PETERS, Defendant-Appellant.	( ) Warren Gotcher 325 E. Carl Albert Parkway McAlester, Oklahoma 74501 918/ 423-3603 ATTORNEYS FOR APPELLEE (a) Larry D. Patton Teresa M. Black U.S. Attorney's Office 4434 Federal Courthouse Oklahoma City, Oklahoma 7310 405-231-5281

No. BELOW: 79-00123-02

JUDGE BELOW: Thompson

Reporter Marks

DATE OF JUDGMENT: 8-22-79

NOTICE OF APPEAL FILED: 8-31-79

Action Commenced: 7-6-79

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS
9/12/79	Docket Fee Paid in District Court			

A-5

NOTE IN ANY EN BANC ORDER THAT JUDGE —— HOLLOWAY DID NOT PARTICIPATE.

9-1986

CASE NO. 79-1986

DATE	FILINGS—PROCEEDINGS
	Filed
9/12/79	CS.DKT. Case docketed
9-19-79	DKT.ST.F. Appellant's docketing statement filed, 7 cc, c/s NAPR.F. Notice of appearance filed by Patton and Black as attorney for appellee.
9/20/79	NAPR.F Notice of appearance filed by Gotcher as attorney for the appella
10/3/79	ROA.F Record on appeal filed, Volume I (pleadings) (108 pp); 1 copy
10/18/79	O.BR.DUE. Order: Appellant's brief due 11/5/79 - McWilliams, Breitenst Doyle O.BR.DUE. Order: Appellee's brief due 11/21/79 -McWilliams,Breitenstei O.HRG.SET. Order: Set for hearing to the Court on Wednesday, November 1979 at 2:00 P.M. in Denver. - McWilliams,Breitenstein, Doyle
10/18/79	HRG.SET Hearing set for November, 1979, Term - Denver, Colorado
11-5-79	M.ADPT.BR.F. Appellant's motion to adopt appellant's brief in 79-1987 filed - 1cc. c/s. ~~M.F.BR.F.--Appellants'-motion-to-file-brief-in-excess-of-pages-filed - 25cc--c/s.~~ ~~BR.F.--Appellant's-brief-filed---25cc.--c/s.~~ ~~APX.F.--Appellant's-joint-appendix-filed---25cc.--c.s.~~
11/7/79	M.ADPT.BR.SUBM Appelalnt's motion to adopt appellant's brief in 79-1987 submitted to panel
11/16/79	M.ADPT.BR.DISP Granted appellant's motion to adopt appellant's brief in 79-1987 disposed of by Barrett BR.F Appellant's brief filed, 25 copies, c/s
11/23/79	BR.F. Appellee's brief filed - 10 cc c/s APX.F. Appellee's appendix filed - 10 cc c/s
11/27/79	BR.F. Appellant's reply brief filed (Stipe) 14 cc c/s
11/28/79	CS.ARG.SUBM - case argued and submitted to Barrett, Doyle, McKay
4/28/80	OPN.F. Published signed opinion filed - Barrett, Doyle, McKay Writing Judge is McKay JM.DISP. Judgment disposed, appeal dismissed MDT.ISS. Mandate issued to district court
5/2/80	ROA.RTN.DC. Record on appeal returned to Dist. Ct. Vol. I
5/7/80	ROA.RCPT.F. Record receipt filed P.REHRG.ENB.F. Appellants' petition for rehearing en banc filed, 11 cc, c/s P.REHRG.ENB.SUBM. Appellants' petition for rehearing en banc submitted to panel
/5/80	MDT.RCPT.F - mandate receipt filed
5/31/80	P.WRIT.CERT.F. Appellant's petition for writ of certiorari filed on 5/27/80 - Supreme Court No. 79-1874

A-6

Form A. O. 147 (July 1953)

GENERAL DOCKET 79-1985

UNITED STATES COURT OF APPEALS

FOR THE

CR. 620 F2d 237 TENTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CASE NO. 79-1985

JUDGE HOLLOWAY RECUSED

Cmp. Cases: 79-1986; 79-1987

TITLE OF CASE	ATTORNEYS FOR APPELLANT
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHN WARREN MARTIN, Defendant-Appellant.	( ) W. H. Layden 323 E. Carl Albert Parkway McAlester, Oklahoma 74501 918/ 423-~~3603~~ 6202
	ATTORNEYS FOR APPELLEE
	(a) Larry D. Patton (a) Teresa M. Black U.S. Attorney's Office Western District of Oklahoma 4434 Federal Courthouse Oklahoma city, OK 73102 405 231-5281

No. BELOW: 79-00123-01

JUDGE BELOW: Thompson

Reporter Marks

DATE OF JUDGMENT: 8-22-79

NOTICE OF APPEAL FILED: 8-31-79

Action Commenced: 7-6-79

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS
bje 9/12/79	Docket Fee Paid in District Court			

A-7

GENERAL DOCKET

79-198

UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

CASE NO.	79-1985	United States of America v. John Warren Martin

DATE	FILINGS—PROCEEDINGS	Filed
9/12/79	CS.DKT. Case docketed DKT.ST.DUE Docketing statement due 9/21/79	
9-19-79	NAPR.F. Notice of appearance filed by Layden as attorney for appellant.	
10/3/79	ROA.F Record on appeal filed, Volume I (pleadings) (108 pp); 1 copy	
10/18/79	O.BR.DUE. Order: Appellant's brief due 11/5/79 - McWilliams,Breitenstei O.BR.DUE. Order: Appellee's brief due 11/21/79 -McWilliams, Breitenstei Doyle O.HRG.SET. Order: Set for hearing to the Court on Wednesday, November 2 1979 at 2:00 P.M. in Denver, McWilliams, Breitenstein, Doyle	
10/18/79	HRG.SET Hearing set for November, 1979, Term - Denver, Colorado	
10/23/79	NAPR.F Notice of appearance filed by Patton and Black as attorneys for Appellee	
11-5-79	M.ADPT.BR.F. Appellant's motion to adopt appellant's brief in 79-1987 filed - 4cc. c/s. ~~M.F.BR.F.--Appellants' motion to file brief in excess of pages filed--25cc. c/s.~~ ~~BR.F.--Appellant's brief filed--25cc. c/s.~~ ~~APX.F.--Appellant's joint appendix filed--25cc. c/s.~~	
11/7/79	M.ADPT.BR.SUBM Appellant's motion to adopt appellant's brief in 79-1987 submitted to panel	
11/16/79	M.ADPT.BR.DISP Granted appellant's motion to adopt appellant's brief in 79-1987 disposed of by Barrett	
11/26/79	BR.F Appellant's brief filed - 25 cc, c/s BR.F. Appellee's brief filed - 10 cc c/s APX.F. Appellee's appendix filed - 10 cc c/s	
11/27/79	BR.F. Appellant's reply brief filed (Stipe) - 14 cc c/s	
11/28/79	CS.ARG.SUBM - case argued and submitted to Barrett, Doyle, McKay	
4/28/80	OPN.F. Published signed opinion filed - Barrett, Doyle, McKay Writing Judge is McKay JM.DISP. Judgment disposed, appeal dismissed MDT.ISS. Mandate issued to district court	
5/2/80	ROA.RTN.DC. Record on appeal retured to Dist. Ct. Vol. I	
5/7/80	ROA.RCPT.F. Record receipt filed. P.REHRG.ENB.F. Appellants' petition for rehearing en banc filed, 11 cc, c/s P.REHRG.ENB.SUBM. Appellants' petition for rehearing en banc submitted to panel	
5/5/80	MDT.RCPT.F - mandate receipt filed	
5/31/80	P.WRIT.CERT.F. Appellant's petition for writ of certiorari filed on 5/27/80 - Supreme Court No. 79-1874	

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed May 7, 1980]

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	No. CR-79-123-T
JOHN WARREN MARTIN, JOHN GLENN PETERS, and GENE STIPE, Defendants.	)	

ORDER CONTINUING STAY

Defendants Martin, Peters and Stipe have moved to continue the stay of proceedings herein until disposition of defendants' application for rehearing *en banc* before the United States Court of Appeals for the Tenth Circuit, and petitions for writs of certiorari in the United States Supreme Court. The government has responded stating its readiness for trial but raising no objection to the motion. Upon consideration and for good cause shown.

IT IS ORDERED that defendants' motion is granted and this Court's order of September 4, 1979, staying trial, is hereby continued pending disposition of defendants' application for rehearing *en banc* before the United States Court of Appeals for the Tenth Circuit and their petitions for writs of certiorari in the United States Supreme Court or to such other time as this Court may direct.

DATED this *7th* day of May, 1980.

(s) *Ralph G. Thompson*
UNITED STATES DISTRICT JUDGE